SUPREME COURT, U. S.
AUG 28 1967
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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 544

ASHTON J. MOUTON, COLLECTOR OF REVENUE FOR THE STATE OF LOUISIANA (Successor in office to Roland Cocreham), AND THE STATE OF LOUISIANA,

Petitioners,

v.

UNITED STATES OF AMERICA AND CHRYSLER CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA AND
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Collector of Revenue for the State of Louisiana, now Ashton J. Mouton, Successor to Roland Cocreham, and the State of Louisiana, hereby petition this Court for a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, in Number 23,589, United States of America and Chrysler Corporation v. Roland Cocreham, Collector of Revenue for the State of Louisiana, and the State of Louisiana.

OPINIONS BELOW

1. The opinion and the decree of the United States Court of Appeals for the Fifth Circuit have not been reported. They are appended hereto as Appendix A.

2. The notice of order of the United States Court of Appeals for the Fifth Circuit denying rehearing has not been reported and is annexed hereto as Appendix B.

3. The opinion and decree of the United States District Court is reported at 247 F. Supp. 731 and is annexed hereto as Appendix C.

4. The opinion of the Nineteenth Judicial Court, Parish of East Baton Rouge, State of Louisiana, is not reported. It appears at page 109 of the Record.

JURISDICTION

The decree of the United States Court of Appeals for the Fifth Circuit was entered and signed on June 9, 1967. A petition for a rehearing was denied on July 7, 1967. An order staying the mandate of the Court for sixty days was signed by Judge John H. Brown, Chief Judge of the Court of Appeals, on July 18, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The decision rendered by the United States Court of Appeals for the Fifth Circuit resolved a decisive question in the case in a way that is in conflict not only with decisions by seven other United States Circuit Courts but also in a manner in conflict with a decision by the United States Supreme Court. Furthermore, the Court of Appeals herein has, by its decision, created a new right in favor of the United States which has never

heretofore existed and which should be reviewed because of its public importance.

QUESTIONS PRESENTED FOR REVIEW

Question No. 1

Does res judicata apply to the United States when the United States, though not a party of record, assumes open and full command of litigation in a State Court through its Attorney General and the Department of Justice? The decision in the State Court was adverse to the interest of the United States.

The jurisprudence of the United States Supreme Court and the jurisprudence of at least seven federal courts of appeal, other than the Court of Appeals for the Fifth Circuit, hold that when a person not a party to the action takes over its defense, he may take advantage of the judgment if he wins, and he will be bound by it if he loses. The United States Court of Appeals for the Fifth Circuit did not apply the rule to the United States in the instant case.

Question No. 2

Does the United States have a right to recover taxes paid by a party, not an agent or instrumentality of the United States, when the taxes so paid are not discriminatory against the United States?

It is submitted that the Court of Appeal for the Fifth Circuit has created such a right in the instant case and that the decision should be reviewed by the Supreme Court because such a right has not heretofore existed.

STATUTES AND REGULATIONS INVOLVED

No federal statutes or regulations are involved in this case. Suit was filed in the United States District Court for the Eastern District of Louisiana because this case concerns a claim by the United States against the State of Louisiana and its Collector of Revenue.

STATEMENT OF FACTS

During the Korean War the Chrysler Corporation (hereinafter referred to simply as "Chrysler") entered into a facilities contract with the United States wherein Chrysler agreed to design, build and establish a functioning tank engine factory in New Orleans to be known as Michoud Ordnance Plant.

On or about November, 1955, the Louisiana Collector of Revenue, petitioner herein, (hereinafter referred to simply as "Collector"), assessed certain sales and use taxes against Chrysler in connection with Chrysler's construction of Michoud Ordnance Plant. At the direction of the United States, Chrysler paid the taxes under protest and then sued to recover the taxes, all in accordance with a Louisiana statute providing for such a procedure. Thereafter, as was found by the Court of Appeal for the Fifth Circuit in a companion case, "The United States through its Attorney General and the Department of Justice was in open full command of this litigation." *City of New Orleans v. United States* (5 Cir. 1967), 371 F. 2d 21. Footnote nine at page 26. The Collector filed an answer to Chrysler's suit, and four years later the United

States officially intervened by filing a petition of intervention in which the United States alleged that Chrysler had no legal or beneficial interest in the property taxed because Chrysler had been reimbursed by the United States for the taxes which Chrysler had paid under protest. The reimbursement had actually taken place four years earlier, on December 7, 1955, (R. 127), but the Collector was not aware of that fact until the petition of intervention by the United States. The Collector answered the intervention of the United States and also filed a motion to dismiss for want of interest based on the fact that Chrysler had no further interest in maintaining the action. (lack of procedural capacity) The motion was sustained and Chrysler's suit was dismissed. The intervention of the United States was also dismissed. *No appeal was taken by either Chrysler or the United States to the Louisiana Appellate Courts even though such an appeal was available to them.* After the expiration of the legal delays for the taking of an appeal or application for review, the decision became final and executory and the taxes, which were then being held in escrow, would have been delivered to the State Treasurer by the Collector, except that Chrysler, joined by the United States, then filed a new action in the United States District Court for the Eastern District of Louisiana, claiming that court had jurisdiction under U.S.C. Title 28, Sections 1345, 1331 and 1332. That Court enjoined the transfer of the taxes to the State Treasury. The taxes are now still in an escrow fund pending final decision in this case.

Chrysler and the United States filed this action on April 15, 1963. The Collector filed a motion to dismiss the action under Rule 12(b) (1), (2) and (6) of the federal rules and, in the alternative, the Collector filed a motion for summary judgment. Chrysler and the United States then filed a motion for summary judgment. The lower court dismissed the motion filed by Chrysler and the United States and sustained the Collector's motion for summary judgment in an opinion reported in 247 F. Supp. 731 (1966) and reproduced in Appendix C herein.

On appeal by both Chrysler and the United States to the United States Court of Appeal for the Fifth Circuit that court reversed the summary judgment in favor of the Collector. This application for a writ of certiorari is made on the grounds that in rendering its judgment of reversal:

(1) The Court of Appeal did not follow those decisions of the Supreme and Appellate Federal Courts to the effect than when a person not a party to a suit actively and avowedly conducts the defense and manages and directs the progress of the suit he may take advantage of the judgment if it is favorable to his interest but he will also be bound by the judgment if it is against his interest.

(2) The Court of Appeal broke new ground in establishing a right in the United States which has not heretofore existed.

In view of the decision of the Court of Appeal for the Fifth Circuit it is feared that further review of these two questions will be precluded should the Collector go back to the District Court without a review of these two questions by this Court.

ARGUMENT ON APPLICATION FOR WRIT

Background

Before discussing the two questions at issue, the attention of this Court is respectfully invited to the fact that in the Louisiana District Court the United States was not only a party by intervention but was also, aside from its contentions as intervenor, an active participant in the case. The following excerpts make this clear:

1. Excerpt from affidavit of Everett M. Scranton, filed by the United States, (R., page 126), relative to an agreement under which the taxes claimed by the Collector were deposited in escrow in the form of bonds rather than cash. That agreement provided that: "Whereas it is further agreed between State and Chrysler that upon final judicial determination pursuant to all appeals which may be taken by Chrysler or upon earlier settlement or compromise between State and Chrysler * * * the bonds as delivered * * * will be turned over by State to Chrysler and/or retained by State as follows . . ." Mr. Scranton states:

> "Prior to execution of said agreement, Chrysler submitted said document to the

Department of the Army for approval, which approval was granted by letter dated 26 October, 1955, a copy of which is attached hereto, and contract DS-20-089-ORD-10891 was later formally amended to give effect to said Agreement by Supplement No. 22, a copy of which is also attached hereto."

2. Allegation No. 15 of the United States' and Chrysler's complaint in the lower federal court. (R., page 4).

"Heretofore, plaintiff Chrysler Corporation, at the direction of the United States, instituted action No. 55,294 in the Nineteenth Judicial District for the Parish of East Baton Rouge, State of Louisiana, to recover said payment."

3. First paragraph, Page 18 of the United States brief filed in the Court of Appeals, referring to the agreement in question states:

"At all times Chrysler was acting on behalf of the Government in this matter..."

4. Finding of the Court of Appeals in *City of New Orleans v. United States*, (5 Cir. 1967), 371 F.2d 21, a companion case.

"The United States through its Attorney General and the Department of Justice was in open, full command of this litigation. See list of counsel 114 So. 2d 579, 145 So. 2d 11.

Argument on Question No. One

The decision in the State Court was adverse to

the interest of the United States. It is respectfully submitted that res judicata applied to the United States when the United States, though not the petitioner in the State Court, assumed open and full command of the litigation through its Attorney General and the Department of Justice.

It is further submitted that the Court of Appeals erred in not applying to the United States, the Court's own rule that when:

> ". . . the non-party actively and avowedly conducts the defense, manages and directs the progress of the trial at its expense and under its supervision, the outcome, which if favorable would have redounded to his benefit, if adverse becomes sauce for goose and gander alike, and binding under the principles of res judicata." *Bros. Inc. v. W. E. Grace Mfg. Company* (C.A. 5, 1958) 261 F. 2d 428 at Page 430.

The record in this case clearly shows that Chrysler paid certain taxes to Louisiana pursuant to instructions of the United States and the litigation to recover those taxes in the Louisiana Court of original jurisdiction was under the control and supervision of the United States. Chrysler lost in the Louisiana Court and because of the rule of the *Bros., Inc.* case, supra, the right to recover taxes, if any existed, was also lost to the United States. That is also the rule of the United States Supreme Court and of at least seven of the other United States Circuit Courts of Appeal. The Second Circuit expresses the rule best:

Minneapolis-Honeywell Regulator Co. v. Thermoco, Inc. (2nd Cir. 1941) 116 F. 2d 845, 846

> "It has been settled doctrine in federal courts for at least seventy-five years that when a person not a party to the action takes over its defence, he may take advantage of the judgment if he wins, and he will be bound by it if he loses, exactly as though he were a party of record (*Lovejoy v. Murray*, 3 Wall, 1, 18, 19, 18 L. Ed. 129)."

United States Supreme Court.

Lovejoy v. Murray, 3 Wall 1, 18 L. Ed. 129 (1866).

First Circuit.

Haddad v. Border Express, Inc. (1st Cir. 1962), 300 F. 2d 885

Western Electric Co. v. Hammond (1st Cir. 1943), 135 F. 2d 283

Third Circuit.

Ark-Tenn Distributing Corp. v. Breidt, et al. (3rd Cir. 1953), 209 F. 2d 359

Fourth Circuit.

E. I. DuPont DeNeimours & Co. v. Sylvania Industrial Corporation (4th Cir. 1941), 122 F. 2d 400

Sixth Circuit.

Ocean Accident and Guarantee Corporation v. Fegelmaker (6th Cir. 1944), 143 F 2d 950

Eighth Circuit.

Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Co. (8th Cir. 1940), 115 F. 2d 1

Ninth Circuit.

Hy-Lo Unit and Metal Products Co. v. Remote Control Mfg. Co. (9th Cir. 1936) 83 F. 2d 345

For the reasons above it is respectfully submitted that the doctrine of unjust enrichment, which the Court of Appeals gave as a basis for its opinion, really had no application to the instant case. The Collector specifically denies that the taxes in question were improperly claimed from Chrysler in the first place but even if they were it is well settled law that certain procedures must be followed in order to successfully sue for the recovery of taxes paid under protest. If the required procedures are not followed the claim for refund must be disallowed. In the instant case it was the United States which chose to attempt recovery of the taxes in question through Chrysler and in so doing the United States actively and avowedly conducted the litigation and managed and directed the case when it was in the Louisiana District Court. Both Chrysler and the United States had their day in court and lost. Therefore, the matter became res judicata under the rulings of the United States Supreme Court and seven courts of appeal as shown by the cases above cited.

Argument on Question No. Two

Does the United States have a right to recover taxes paid by a party, not an agent or instrumentality

of the United States, when the taxes so paid are not recovered by the party which has paid them and the taxes are not discriminatory against the United States? It is submitted that such a right has never been created by the federal courts as the following cases will show.

In *United States v. Independent School District* (10 Cir. 1954), 209 F. 2d 578 the court held that an instrumentality of the federal government, the Department of Agriculture, had the right to recover moneys paid to a school board the amount of which was not substantiated by a later audit of the records of the school board.

In *United States v. City of Philadelphia* (D.C. Penn. 1943) 50 F.S. 170 the court held that an *agency* of the *United States*, the Library of Congress had the right to recover ad valorem taxes paid on property owned by the library.

In *United States v. Bureau of Revenue* (10 Cir. 1961) 291 F. 2d 677, the court found that the tax collected from a vendor of the United States was discriminatory against the United States in that the tax was applied against the United States but not agencies of the State of New Mexico. The right of the United States to sue in the federal courts was maintained even though the litigation was between the State of New Mexico and a taxpayer. This case is as far as the federal courts have gone in allowing the United States to maintain an action in a federal court in such matters.

As far as is known by undersigned counsel, no United States court has ever held that the United States has a derivative right to recover taxes paid by one with whom it does business simply because of that business relationship and because the United States bears the economic burden of the tax. The taxes must be either discriminatory against the United States as in *United States v. Bureau of Revenue, supra,* or the one who pays the taxes must be an agency or instrumentality of the United States, as in *Independent School District* and *City of Philadelphia, supra.* The federal courts have never held that taxes, the economic burden of which passes on to the United States, can be recovered by the United States on the basis of only a business relationship between the United States and a private party. The right to recover such taxes paid rests in the taxpayer only. The effect of the Court of Appeals ruling in this case is to extend the rule of the *Bureau of Revenue,* the *Independent School District* and *City of Philadelphia* cases to give the United States the right to recover the taxes solely on the ground that the economic burden of such taxes have been passed on to the United States.

No argument can be made that Chrysler was acting as an agent of the United States and therefore the United States was entitled to file this suit because of a tax paid by one of its agents, as in *City of Philadelphia, supra,* because such a holding is directly contrary to the agreement reached by Chrysler and the State of Louisiana which was first approved by

the United States. That agreement clearly states that the taxes paid in escrow were to be paid to the winner upon "*final judicial determination pursuant to all appeals which may be taken of the suit for recovery to be filed by Chrysler . . .*" It is submitted that when the decision rendered by the Louisiana District Court was *not* appealed to the next higher Louisiana Appellate Court in the instant case then there was a final determination. If Chrysler was the agent of the United States then certainly the United States was bound by the acts of its agent particularly when all the acts performed by Chrysler were at the direction and under the full control of the United States.

PRAYER

For the foregoing reasons petitioners respectfully pray that a writ of certiorari be granted. The printed record herein, including the proceedings in Court of Appeals for the Fifth Circuit, is enclosed herewith.

Respectfully submitted,

CHAPMAN L. SANFORD,
General Counsel.

CYRUS A. GRECO,
EMMETT E. BATSON,
Attorneys.

Department of Revenue,
State of Louisiana,
P. O. Box 201, Capitol Station,
Baton Rouge, Louisiana.

CERTIFICATE OF SERVICE

I, Chapman L. Sanford, an attorney for petitioner, do hereby certify that I have this day served a copy of the foregoing petition and appendices on the Solicitor General of the United States and on each of the attorneys of record of the respondents as shown below by depositing same in the United States Post Office with sufficient air mail postage prepaid.

August _____, 1967.

CHAPMAN L. SANFORD,
Attorney of record.

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cc: Solicitor General of the United States
Department of Justice
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APPENDIX A

(1) Opinion By Circuit Court

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23589

UNITED STATES OF AMERICA AND CHRYSLER CORPORATION,

Appellants,

v.

ROLAND COCREHAM, COLLECTOR OF REVENUE FOR THE STATE OF LOUISIANA AND THE STATE OF LOUISIANA,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

(June 9, 1967.)

Before HUTCHESON, COLEMAN and GOLDBERG, Circuit Judges.

PER CURIAM: In 1951 Chrysler Corporation entered into a "facilities contract" with the United States Government whereby Chrysler undertook to equip the Government's Michoud Ordinance Plant, located in New Orleans, Louisiana, for the production of military tank engines. Pursuant to that agreement Chrysler acquired tangible personal property, valued at approximately 40 million dollars, upon which both the City of New Orleans (hereafter City)

and the State of Louisiana (hereafter State) assessed a use tax against Chrysler.

Chrysler paid the taxes under protest. It did so pursuant to instructions of the United States which had agreed to reimburse Chrysler for the payments. Chrysler filed suit against the State in a Louisiana state trial court for refund of the taxes involved here, and the United States later intervened. The court found that Chrysler had been taxed illegally because the use tax was based on ownership, and under the facilities contract the United States, not Chrysler, was the owner of the property. Yet Chrysler did not recover the taxes because the court held that Chrysler had no standing to maintain the suit. Under the state statute providing for recovery of taxes illegally assessed and collected,[1] a right of action is created only for a "person aggrieved" by the collection of the tax. Chrysler was not aggrieved because it had been reimbursed. It therefore had no right of action, and the suit was dismissed. The intervention of the United States fell with the main demand.

The United States and Chrysler then instituted suit in the court below. The district court acknowledged that the taxes were collected illegally, but re-

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[1]LSA-R.S. 47:1576 provides: "A right of action is hereby created to afford a remedy at law for any *person aggrieved* by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. *The person resisting the payment* of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, *shall pay the amount* found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof . . . ." (emphasis added).

iterated that the state statute did not provide Chrysler with standing to sue for recovery of the taxes. It held that the United States also lacked standing because it was not the person who had paid the taxes, as the statute requires. Summary judgment was granted for defendants. 247 F. Supp. 731 (E.D.La. 1965).

Since the district court's opinion was handed down, another panel of this Court has decided a companion case in which Chrysler sought to recover the taxes it had paid to the City under the same reimbursement arrangement with the United States. *City of New Orleans v. United States*, 371 F.2d 21 (5th Cir. 1967). It was recognized in the companion case that neither Chrysler nor the United States were given standing to sue for refund by the city ordinance, which is substantially the same as the state statute involved here, because of the manner in which the illegal taxes were paid. However, it was held that the United States did not need to rely on the ordinance for standing: "Against the inequities of such a procedural trap, we think there is ample power in the United States District Court to protect the sovereign against such unjust enrichment on familiar principles of money had and received." 371 F.2d at 28. We are unable to distinguish that case from the one before us in any significant respect. The facts regarding ownership of the property, the arrangement of payment, the city ordinance and the state statute are all substantially the same. The contentions raised here by the State therein were rejected.

It is clear that the companion case, which expressly disapproved of the holding of the court below,[2] is controlling here. Accordingly, the summary judgment of the district court must be reversed.

REVERSED.

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[2]The Court in City of *New Orleans v. United States*, *supra*, stated:

"This holding makes it inescapable for us to disapprove as to the United States the contrary conclusion in the companion case growing out of collection of $900,000 for Louisiana State sales and use tax, LSA-R.S. 47:301, on Chrysler's Michoud activities. *United States v. Cocreham*, E.D.La., 1965, 247 F. Supp. 731. Judge West, in a full opinion tracing the identical course of that case under a state tax refund statute, LSA-R.S. 47:1576, in all respects identical to the city ordinance . . . holds the parties, as do we, to the earlier judicial finding of ownership in the Government, not Chrysler. However, recovery was denied because the United States did not and could not comply with the tax refund statute, LSA-R.S. 47:1576."

(2) Judgment of Circuit Court

No. 23589

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, in accordance with the opinion of this Court.

June 9, 1967

Issued as Mandate:

APPENDIX B

(1) Notice From the Circuit Court denying the petition for rehearing.

Re: 23589—*United States of America and Chrysler Corp. v. Roland Cocreham, Collector of Revenue for the State of Louisiana and The State of Louisiana*

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition( ) for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH, CLERK
By /s/ LAURENCE TALAMO
Deputy Clerk

(2) Order staying Mandate of the Circuit Court

ORDER

On further consideration of the application of appellees for a stay of the issuance of the mandate, and it appearing that a stay of the mandate was heretofore granted in the companion case entitled City of New Orleans and Robert E. Develle, etc., vs. United States of America, Et Al, No. 22554,

IT IS ORDERED that appellee's application for stay of the issuance of the mandate pending their petition for certiorari be, and the same is hereby Granted as prayed for.

/s/ JOHN R. BROWN
Chief Judge United States Court of Appeals

(Original Filed — July 18, 1967)

APPENDIX C

(1) Opinion of the United States District Court

UNITED STATES OF AMERICA AND
CHRYSLER CORPORATION

v.

ROLAND COCREHAM, COLLECTOR OF REVENUE
FOR THE STATE OF LOUISIANA, AND
THE STATE OF LOUISIANA.

Civ. A. No. 2783.

United States District Court
E. D. Louisiana,
Baton Rouge Division.

Nov. 29, 1965.

WEST, District Judge

This is a suit brought by the United States of America and the Chrysler Corporation against the State of Louisiana and its Collector of Revenue seeking a refund of certain sales and/or use taxes and interest in the amount of $1,061,861.65 paid by Chrysler under protest. The State of Louisiana claims to have legally assessed and collected the taxes pursuant to the provisions of Louisiana Revised Statutes 47:301 et seq., and also contends that even if the taxes were illegally collected, Chrysler has lost its right to recover them and the United States has no standing to sue for their recovery. Stated briefly, the facts leading up to this litigation are as follows:

In 1951, during the Korean Conflict, the United

States Government leased the industrial site known as the Michoud Plant in New Orleans, Louisiana, to the Chrysler Corporation, who, according to the terms of the lease contract, after rearranging and restoring the plant, installed and operated the necessary tools, machinery, and equipment to produce tank engines. This was done under what was commonly referred to as a "facilities contract" between Chrysler and the United States. Pursuant to the terms of this facilities contract, all property purchased by the Chrysler Corporation for use in the plant became, immediately upon purchase, the property of the United States of America exclusively. As a result of this operation, the State of Louisiana, on or about May 27, 1955, through its Collector of Revenue, made an assessment against Chrysler Corporation and demanded payment of the sum of $925,504.26, representing a deficiency in taxes and interest claimed by the State of Louisiana to be due under the Louisiana General Sales and Use Tax Statute, LSA-R.S. 47:301 et seq., by reason of Chrysler's use of certain personal property in the Michoud Plant. On November 30, 1955, Chrysler arranged to pay the claimed deficiency under protest. Pursuant to agreement entered into between the State of Louisiana and Chrysler, the latter deposited with the State certain cash and United States bonds to be held segregated during the pendency of litigation to determine the validity of the assessment. A total of $1,061,861.65 was deposited in escrow under this agreement. This agreement between the State of Louisiana and Chrysler provided, in part, as follows:

"WHEREAS, it is further agreed between State and Chrysler that upon final judicial determination pursuant to all appeals which may be taken of the suit for recovery to be filed by Chrysler, or upon earlier settlement or compromise between State and Chrysler, the $695.13 in cash so segregated and held and the bonds so delivered and all accrued interest thereon, whether then collected and held in cash or then uncollected (all hereinafter, for convenience, called 'segregated cash and bonds'), will be turned over by State to Chrysler and/or retained by State as follows:

"There will be turned over to Chrysler that proportionate part of the total said segregated cash and bonds computed as of the date of turning over, which is equal to the ratio that the amount, if any, of the $925,504.26 assessment finally determined in said suit to be recoverable by Chrysler, * * * and there will be retained by State the remainder, if any, of such segregated cash and bonds; and * * *."

Pursuant to this agreement, on December 27, 1955, Chrysler filed suit in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, at Baton Rouge, Louisiana, seeking recovery of these funds which it had paid to the State of Louisiana under protest. It was not until December 8, 1959, four years later, that the United States intervened in that suit, alleging that it had

an interest in the subject matter of the litigation. In its intervention, the United States alleged that some time before the suit had been instigated by Chrysler, it, the United States, had reimbursed Chrysler the amount of the taxes and interest paid under protest, and had agreed that if Chrysler was successful in its suit against the State of Louisiana, the monies so recovered would be paid over by Chrysler to the United States. This petition of intervention prayed only for judgment in favor of the plaintiff, Chrysler Corporation, and against the State of Louisiana. This intervention was the first notice had by the State of Louisiana of the alleged pecuniary interest of the United States in this suit. In response to Chrysler's suit, the State of Louisiana filed an answer, and also filed exceptions of no right and no cause of action. The Trial Court referred these exceptions to the merits, and the case was tried in the State Court on June 20, 1961. On March 12, 1963, that Court sustained the defendant's exceptions of no right and no cause of action as to the plaintiff, Chrysler Corporation, on the ground that since Chrysler, prior to the institution of suit, had been completely reimbursed by the United States for all taxes paid by it under protest to the State of Louisiana, it, Chrysler, no longer had the requisite interest to maintain the suit. Since the defendant's exceptions were sustained, there was actually no need for the Court to make any findings on the merits. But nevertheless, in addition to finding a lack of interest on the part of Chrysler Corporation and thus sustaining the ex-

ceptions, the Court did find, on the merits, that the State statute under which the use tax was collected provided for the taxation only of an *owner's* use of property; that Chrysler never owned any of the property, the use of which had been taxed; that the United States was at all pertinent times the owner of the property; that *if* Chrysler had been entitled to any recovery, the United States would, pursuant to its agreement with Chrysler, have been entitled to receive from Chrysler whatever monies were recovered as a result of the litigation. As a result of the dismissal of Chrsyler's suit, the intervention filed by the United States was, at the same time, dismissed because under Louisiana law, the intervention must either stand or fall with the main demand. No appeal from this decision was taken by either Chrysler or the United States, and the judgment was allowed to become final and executory on April 16, 1963. On April 15, 1963, the day before the judgment became executory, the present suit was filed. After answer to this suit had been filed, the defendant, on April 9, 1965, filed a motion to dismiss, and alternatively, for summary judgment on the grounds that (1) this Court lacks jurisdiction over the subject matter of the complaint; (2) this Court lacks jurisdiction over the defendant; (3) the complaint fails to state a claim upon which relief can be granted; and (4) in the alternative, the defendant is entitled to summary judgment as a matter of law, there being no material issues of fact involved. On June 18, 1965, the plaintiff filed its motion for sum-

mary judgment and it is these two motions that are presently before this Court.

Despite the scholarly argument of counsel for plaintiff to the contrary, it is the opinion of this Court that the matters presently before this Court involve the identical issues which have previously been adjudicated both by the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, in the unreported case of *Chrysler Corporation v. Rufus Fontenot, Collector of Revenue, State of Louisiana,* bearing its Docket No. 55,294, and by the Supreme Court of the State of Louisiana in the case of *Chrysler Corporation v. City of New Orleans,* 243 La. 498, 145 So.2d 11 (1962).

Briefly stated, the plaintiff in this case contends that since Chrysler Corporation did not own the property on which a use tax was assessed, the assessment and collection of the tax by the State of Louisiana was illegal, null and void. Secondly, that because the United States of America, pursuant to an agreement between it and Chrysler, reimbursed Chrysler the full amount of the taxes paid by it under protest to the State of Louisiana, the United States of America not only has an interest in this litigation but in fact has the capacity to sue for recovery of these funds. They contend that the State of Louisiana has illegally collected these taxes, and that therefore, it has no right to their retention. The plaintiffs further argue that the State of Louisiana would be unjustly enriched should this Court hold that it could retain these

funds which have been illegally collected from Chrysler. Both plaintiffs rely on the findings of both the Nineteenth Judicial District Court and the Louisiana Supreme Court, wherein both Courts found, as a fact, that Chrysler Corporation did not own any of the property involved, and that title to the property at all times was vested in the United States of America, and that hence the State of Louisiana had no legal right to assess a tax against the Chrysler Corporation, but neither plaintiff is willing to accept the additional findings of the same Courts that under Louisiana law, Chrysler has no legal right now to recover these taxes. Plaintiffs rely heavily on the statement made by the Louisiana Supreme Court in *Chrysler Corporation v. City of New Orleans, supra,* wherein it stated:

> "The United States fully reimbursed Chrysler prior to the institution of this suit and is ultimately entitled to the money if it is recovered."

The plaintiffs construe this statement as a finding by those State Courts that the United States is, in fact, entitled to the recovery of these funds from the State of Louisiana.

The defendant, on the other hand, asserts many defenses to this suit, but only those deemed necessary to a determination of this matter will be considered. It is contended by the defendant that the Chrysler Corporation does not have the requisite interest to maintain this action, and that even if it did, it does not have the necessary consent of the State of Louisi-

ana to maintain this action in this Court; that the holding by the Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana, previously referred to herein, is res judicata to the present action, both with respect to the Chrysler Corporation and the United States of America; that the United States of America does not have the requisite interest to maintain this action, and that even if it does, the fact that it has not complied with the provisions of LSA-R.S. 47:1576 precludes it from maintaining this action.

For the reasons hereafter stated, it is the opinion of this Court that the defendant's motion for summary judgment should be granted.

When the tax in question was assessed by the State of Louisiana against the Chrysler Corporation, and when the Chrysler Corporation paid this tax under protest, it had, at that time, a right, pursuant to the provisions of LSA-R.S. 47:1576, to sue for recovery of the taxes which it claimed to have been illegally assessed and collected. That statute provides, in part, as follows:

> "A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Subtitle, shall pay the amount found due to the col-

lector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit."

Thus, at the time the tax was paid under protest by Chrysler Corporation, and before it had been reimbursed by the United States, it had standing to sue under the provisions of this statute for recovery of those funds. At that time, there is little doubt that Chrysler would have been considered to be a "person aggrieved" and as such, entitled to bring action for recovery. However, this statute has now been interpreted by the Supreme Court for the State of Louisiana, and that Court has held that where the party who paid the tax under protest has, before institution of a suit for recovery, been completely reimbursed by a third party, the party originally paying the tax no longer has the requisite interest to maintain an action for recovery of the taxes. This was a part of the holding in the case of *Chrysler Corporation v. City of New Orleans*, 243 La. 498, 145 So.2d 11 (1962), which was a suit identical with the present suit except that it involved the payment, under protest, by the Chrysler Corporation of a use tax to the City of New Orleans covering the use of the very same property involved in the present case. The city

ordinance establishing the use tax in favor of the City of New Orleans is identical in every relevant respect with the State statute under which the present suit is brought, and the very same parties who are parties to this suit litigated the City of New Orleans case referred to. That case went to the State Supreme Court, which, in the course of its opinion, stated:

> "In 1951 the United States leased the Michoud plant at New Orleans to Chrysler for the production of tank engines. Under a facilities contract with the government, Chrysler undertook to modify, equip, and adapt the plant to produce these engines. The use taxes collected from Chrysler by the City were on the use of tangible, personal property imported by Chrysler from outside the City for installation in the plant.
>
> * * *
>
> "The record discloses that the title of the property at no time vested in Chrysler, but passed directly from the various vendors to the United States. Chrysler paid the taxes on instructions of the United States government under a reimbursement agreement. The United States fully reimbursed Chrysler prior to the institution of this suit and is ultimately entitled to the money if it is recovered. Hence the exception of want of interest stands at the threshold of the case.
>
> "For a right of action under this ordinance, a party must be aggrieved. A pecuniary interest is essential. As we stated in our previous deci-

sion herein, the 'use' embraced by the ordinance is the exercise of a right or power over property incident to ownership. The tax is imposed upon the owner. In the instant case the owner was the United States. Chrysler paid the tax under instructions of the United States government with attendant reimbursement. Moreover, the United States is ultimately entitled to the money if it is recovered. Under the circumstances, Chrysler does not have the requisite interest to maintain this action.

* * *

"The fact that the United States as an intervenor prays for judgment in favor of Chrysler is of no moment. This does not convert the suit into one by Chrysler for the use and benefit of the United States. The intervention either stands or falls with the main demand. Since the main demand must fall, the intervention falls with it."

Hence, even though upon paying the tax under protest to the State of Louisiana, the Chrysler Corporation had standing to sue for its refund, nevertheless, when Chrysler Corporation was fully reimbursed for all monies paid to the State of Louisiana prior to the institution of its suit for refund it, Chrysler Corporation, lost its standing to sue for refund. This Court is, of course, bound by the interpretation placed upon that statute by the Supreme Court of the State of

Louisiana. Hence, there is simply no question but that Chrysler Corporation has no standing to maintain this present suit against the State of Louisiana. Not only is it clear from the agreed facts in this case that, under the interpretation placed upon LSA-R.S. 47:1576 by the Supreme Court of Louisiana, Chrysler Corporation has no standing to pursue this suit for refund, but in addition thereto, it is equally clear that the holding of the Nineteenth Judicial Court for the Parish of East Baton Rouge, Louisiana, in a suit identical with this one, is res judicata insofar as Chrysler Corporation is concerned.

Article 2286 of the Louisiana Civil Code of 1870 provides:

"The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

Article 3556(31) of the Louisiana Civil Code of 1870 provides:

"Thing adjudged.—Thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal."

The very same demands made by Chrysler Corporation in this suit were made in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana. All of the issues presently before this Court were before that Court, and that Court, relying on the authority of the decision of the Supreme Court of the State of Louisiana in *Chrysler Corporation v. City of New Orleans, supra,* decided against Chrysler. Chrysler voluntarily let that judgment become final without appealing, and consequently, that decision is res judicata to any subsequent identical suits. But Chrysler now contends that its rights under the agreement entered into between it and the State of Louisiana on November 30, 1955, were not adjudicated by the State Court. This Court cannot agree with that contention. The agreement of November 30, 1955, the pertinent part of which has been heretofore quoted, merely provided for the method of distribution of the funds in escrow at the conclusion of a suit to be filed by Chrysler pursuant to the provisions of LSA-R.S. 47:1576. Obviously, when the Court held that Chrysler could not maintain its action for recovery under that statute, and there being no other statute under which it could maintain an action for refund, it logically follows that pursuant to the provisions of the agreement of November 30, 1955, all of the funds in escrow are to be retained by the State of Louisiana. Consequently, there was nothing further to adjudicate insofar as the agreement of November 30, 1955, is concerned. Chrysler was simply not entitled to recover any of

the money paid by it under protest because of the fact that it had already been reimbursed all of the money expended by it, and it no longer had the required interest to sue. This was clearly and definitively decided by the Supreme Court of the State of Louisiana.

There is still another reason why this present suit must be dismissed insofar as Chrysler Corporation is concerned. Chrysler Corporation simply has no right to bring this action against the State of Louisiana in the Federal Court. LSA-R.S. 47:1576 provides in part:

> "This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Sub-title, as to the legality of any tax accrued or accruing or the method of enforcement thereof * * *"

Article III, Section 35, of the Louisiana Constitution provides:

> "The Legislature is empowered to waive, by special or general laws or resolutions, the immunity from suit and from liability of the state, and of parishes, municipalities, political subdivisions, public boards, institutions, departments, commissions, districts, corporations, agencies and authorities and other public or governmental bodies; * * * The Legislature shall, by special

or general laws or resolutions, prescribe the procedural rules, including rules of venue and service of process, to govern suits against the state and other public bodies; the procedure in such suits, in the absence of applicable procedural rules promulgated by the Legislature, to be the same as in suits between private litigants. * * * *No suit authorized under this constitutional provision shall be instituted in any court other than a Louisiana State court.* * *"*
(Emphasis added.)

At first blush it would seem that the above quoted statute and the above quoted constitutional provision are in conflict in that the statute apparently allows a suit to be brought in either the State or Federal Court for recovery of taxes paid under protest, while the Constitution of the State of Louisiana prohibits a suit against the State of Louisiana in any court other than a court of the State of Louisiana. Actually, these two provisions are not in conflict because of the fact that the statutory provision affording a legal remedy gives a right of action in any "state or federal court *having jurisdiction of the parties and the subject matter* * * *." This provision is obviously included for the purpose of giving effect to well settled jurisprudence to the effect that under certain circumstances a state may be sued in a Federal Court even without its consent. Thus, it is well settled that the Federal District Court does have jurisdiction over a case brought by the United States against a state. *United States v. State of California,*

328 F.2d 729 (1964), cert. den. 379 U.S. 817, 85 S.Ct. 34, 13 L.Ed.2d 29. Also, it is well settled that in such a case, consent of the state is not required. *United States v. State of Texas*, 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285 (1892); *United States v. State of Louisiana*, 339 U.S. 699, 70 S.Ct. 914, 94 L.Ed. 1216 (1950); *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934). Thus, no violence is done to LSA-R.S. 47:1576 by holding that that statute does not give consent to Chrysler Corporation to maintain this action against the State of Louisiana in a Federal Court. The State of Louisiana is expressly prohibited from granting such authority to be sued in a Federal Court by the provisions of Article III, Section 35, of the Louisiana Constitution, supra. Thus, for this additional reason, Chrysler Corporation has no standing to maintain this suit against the State of Louisiana in this Court.

There is, however, more difficulty encountered when attempting to apply the doctrine of res judicata to the claim of the United States. Ordinarily the exception of res judicata estops whenever the same question recurs between the same parties regardless of whether the questions are presented by petition, exception, rule, or intervention. Hence, if the issues are actually adjudicated, even though one be a party by intervention the exception of res judicata may estop him from relitigating the same issues in another proceeding. However, in the present suit, the question is whether or not the prior proceedings in the State Court resolved the question of the right of the United

States to recover these funds from the State of Louisiana. A careful review of this record indicates that no such direct determination was made in the prior cases either by the Nineteenth Judicial District Court or by the Louisiana State Supreme Court. In both cases it was determined only that because of the fact that the Chrysler Corporation had been reimbursed the monies expended by it, it, the Chrysler Corporation, no longer had the requisite interest to maintain this action against the State of Louisiana. It did not pass upon the question of whether or not the United States, separate and apart from the Chrysler Corporation, had the requisite interest to maintain its action for the recovery of these funds. But even though the doctrine of res judicata may not be applied under these circumstances to the United States, nevertheless, it is not difficult to determine that the United States does not have the requisite interest to maintain this action. The procedure for recovering illegally collected taxes in the State of Louisiana is specifically provided for by LSA-R.S. 47:1576. As previously noted, this statute provides that the person resisting the payment of the taxes shall pay the amount found to be due by the Collector and at that time shall give the Collector notice of his intention to file suit for the recovery thereof. It further provides that if *the person paying the tax to the State of Louisiana* files suit within thirty (30) days after its payment, the funds will be segregated and so held pending the outcome of the suit. This statute is clear and unambiguous. It does not give the right to any

one other than the person actually paying the tax to the State of Louisiana to file a suit for its refund. In the instant case, there is no claim that the United States paid any tax whatsoever to the State of Louisiana. As a matter of fact, the State of Louisiana at no time attempted to assess or collect any tax from the United States of America. If the United States was under any obligation to refund this money to the Chrysler Corporation, such obligation arose because of some contractual obligation between Chrysler and the United States, and had nothing whatsoever to do with the State of Louisiana. Had the United States not prematurely made the refund to Chrysler, Chrysler would have been able to maintain its suit for refund. But when the United States voluntarily reimbursed Chrysler for the taxes it had paid under protest, it thereby deprived Chrysler of any right that it had to sue the State of Louisiana for refund. At the same time, the United States, not having been assessed any tax by the State of Louisiana, and not having paid any tax to the State of Louisiana, simply has no standing under the provisions of the statute to bring this suit for the refund of monies paid to the State of Louisiana by some third party.

It is argued by counsel for the United States that such a holding will permit the State of Louisiana to become unjustly enriched because it enables the State to retain monies which it had no right to collect in the first place. This may well be true, but it is not necessarily unusual or illegal. For instance, the State, as well as other taxing authorities, is often legally

entitled to retain money which it has improperly collected. For example, there is no question but that certain procedures must be followed in order to successfully sue for the recovery of taxes paid under protest. If the required procedures are not followed, the claim for refund must be disallowed. Also, there is no question but that the State has the right to place a prescriptive period on the time within which a suit for refund must be brought. If one pays a tax under protest, and then fails to bring suit for refund within the required time, he loses his right to bring such an action. In any of these events, the State has the unqualified right to retain the funds so collected, even though they may have been originally illegally collected. The law likewise prescribes prescriptive periods within which one must bring an action to collect an open account, to collect on a promissory note, and to recover on many other kinds of claims. In the event suit is not brought within the prescribed time, the person holding the funds in question has the unqualified right to retain them. They may, in a sense, be unjustly enriched by being allowed to retain the funds, but the fact remains that if the one to whom the money rightfully belongs fails to assert his claim within the time prescribed by law, he forfeits his right to the funds. That is precisely what has happened in the present case. It was by the actions of the United States itself that the Chrysler Corporation was deprived of any right that it otherwise had for the recovery of these funds. When the United States reimbursed Chrysler for the amount of taxes

it had paid under protest, Chrysler agreed only to return to the United States such funds as it, Chrysler, might recover from the State of Louisiana pursuant to a suit to be filed by it for refund. The fact remains that Chrysler, because of the actions of the United States, was entitled to no refund from the State of Louisiana. Since it was entitled to no refund from the State, it simply had no further obligation to the United States insofar as these taxes are concerned.

The United States, while on the one hand strenuously objecting to the application of the doctrine of res judicata to its present claim, on the other hand, contends that it is, in this suit, entitled to recover because both the Louisiana State Supreme Court and the Nineteenth Judicial District Court stated that:

> "The United States fully reimbursed Chrysler prior to the institution of this suit and is ultimately entitled to the money if it is recovered."

It assumes a rather strange position. It contends on the one hand that it is now bound by the prior decisions of the State Courts in those cases, but on the other hand, insists that its right to recovery has been conclusively established by the above quoted statement of both the District Court and the Supreme Court of the State of Louisiana. This inconsistent position is not important, however, because of the fact that neither the State District Court nor the State Supreme Court actually found that the United States of America was entitled to a refund of this

money. Those Courts merely stated that the United States would be entitled to recover the money "if it is recovered." Obviously both of those Courts were merely referring to the fact that if Chrysler were able to recover these funds from the State of Louisiana, it, Chrysler, because of its agreement with the United States, would be obligated to turn the money so recovered over to the United States. This, by no stretch of the imagination, was a determination by either of those Courts that the United States was, in fact, entitled to recover anything from the State of Louisiana. The fact of the matter is that the right of the United States to recover on its own from the State of Louisiana was not decided by either of those State Courts. This Court now decides that question. The clear facts of this case show that, as has already been decided by two State Courts, title to the property in question vested exclusively in the United States of America. The State of Louisiana had no authority to levy or collect a tax from the United States of America, nor did it ever attempt to do so. The United States never paid any tax to the State of Louisiana, either voluntarily or involuntarily, and because of this fact, the United States did not and could not comply with the provisions of LSA-R.S. 47:1576. This statute, being the only means by which one can sue for the recovery of taxes paid, and the United States not having complied with that statute, it obviously cannot maintain this action against the State of Louisiana for a refund of these taxes. It is therefore the opinion of this Court that plaintiff's motion

for summary judgment should be denied, and defendant's motion for summary judgment against both plaintiffs should be granted. Judgment will be entered accordingly.

(2) Judgment of District Court

Civil Action No. 2783

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

UNITED STATES OF AMERICA, AND
CHRYSLER CORPORATION,
Plaintiffs,

V.

ROLAND COCREHAM, COLLECTOR OF REVENUE
FOR THE STATE OF LOUISIANA,
AND THE STATE OF LOUISIANA,
Defendants.

JUDGMENT

This cause having come on to be heard before the Court, Honorable E. Gordon West, District Judge, presiding on motions of defendants, Collector of Revenue for the State of Louisiana, and the State of Louisiana, to dismiss the complaint under Rule 12(b) of the Rules of Civil Procedure on the grounds that the Court lacks jurisdiction over the defendant and the subject matter of the action and that the complaint fails to state a claim upon which relief may be granted, and, in the alternative, for summary judgment under Rule 56 of the Rules of Civil Procedure, and on plaintiffs' motion for summary judgment under Rule 56 of the Rules of Civil Procedure, and the Court having been fully advised and having

filed its written opinion herein dated November 29, 1965, for the reasons therein stated, it is

ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for summary judgment be and it hereby is denied; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment be and it hereby is granted and the complaint of plaintiffs United States of America and Chrysler Corporation be and it hereby is dismissed; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that for the reasons set forth therein, the preliminary injunction issued herein on July 2, 1963, be and it hereby is continued in effect during the delays permitted for the taking of an appeal to the Fifth Circuit Court of Appeals and thereafter during the pendency of such an appeal, if any be timely taken to said Court.

Dated and entered at Baton Rouge, Louisiana, this 11th day of January, 1966.

United States District Judge
/s/ E. GORDON WEST

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 544

ASHTON J. MOUTON, Collector of Revenue for the State of Louisiana (Successor in office to Roland Cocreham) and THE STATE OF LOUISIANA, PETITIONERS

v.

UNITED STATES OF AMERICA and CHRYSLER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This is an action by the United States and Chrysler Corporation to recover approximately $925,000 in state use taxes and interest that Chrysler paid under protest. Pursuant to a contract with the United States, Chrysler undertook to acquire for the government the machinery and equipment necessary to adapt the Michoud Ordnance Plant in New Orleans

to produce military tank engines. Petitioners assessed use taxes upon Chrysler's use of the property, which it acquired for the United States in carrying out this contract. Chrysler entered into an agreement with petitioners for payment of the tax by delivering cash and bonds to be held in safekeeping pending a final judicial determination. Pursuant to their contract, the United States reimbursed Chrysler for the amount paid under protest and is entitled to any part of the fund recovered. (Pet. 17-18, 24-26; R. 32-37, 43, 128-136.) [1]

Chrysler instituted a suit for refund in a Louisiana state court, and the United States subsequently intervened.[2] The state court determined in that litigation (1) that the statute [3] taxes only the use of tangible personal property by its *owner*, not the use of the property by someone else, and (2) that the United States, not Chrysler, was the owner of the property in question (R. 114-117). Based on this conclusion, the court followed the decisions of the Supreme Court of Louisiana in the companion litigation involving City of New Orleans taxes [4] and held (1) that Chrysler did

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[1] "R." references are to the printed record filed in the court of appeals.

[2] Contrary to petitioners' statement (Pet. 5), the record indicates that petitioners have been aware of Chrysler's right to reimbursement and the government's interest since before the time the escrow agreement was arranged (R. 126).

[3] 25 West's Louisiana Statutes Annotated, Revised Statutes, Secs. 47:301(18), 47:302.

[4] *Chrysler Corp.* v. *City of New Orleans*, 238 La. 123, 114 So. 2d 579; *Chrysler Corp.* v. *City of New Orleans*, 243 La.

not have the requisite standing under Louisiana procedure to maintain the suit for a refund since it was not the owner of the property and had been reimbursed by the United States (R. 114-115), and (2) that this conclusion required dismissal of the United States intervention, since under Louisiana law an intervenor cannot maintain the action after the main demand of the plaintiff has been dismissed (R. 115).

As in the litigation over the New Orleans taxes, see *City of New Orleans* v. *United States*, 371 F. 2d 21 (C. A. 5), certiorari denied, 387 U.S. 944, petition for rehearing pending, No. 1303, Oct. 1966 Term, the United States then instituted the instant case as an independent action to recover the fund based on unjust enrichment, money had and received, and the escrow agreement, contending that since petitioners may not tax the United States on property owned by the United States[5] and the statute did not purport to tax Chrysler, a non-owner, it followed that the tax was invalidly collected (R. 2-8). Chrysler has been joined as a party plaintiff only to insure that the United States is granted complete relief. The district court granted summary judgment for petitioners and denied summary judgment for the United States (Pet. 46-47). Acknowledging that the taxes were collected illegally (Pet. 44), the district court reiterated that

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498, 145 So. 2d 11. Counsel for petitioners participated in both appeals as *amicus curiae*.

[5] *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *United States* v. *Allegheny County*, 322 U.S. 174, 176-177.

state law[6] did not provide Chrysler with standing to sue for recovery of the taxes and held that the United States also lacked standing because it was not the person who had paid the taxes, as the statute requires (Pet. 18-19, 31-44). That court also ruled that Chrysler was barred by the prior action in the State court and because Louisiana had not consented to Chrysler's suit in the federal court.[7]

Noting that the reasoning of the district court had been expressly rejected in the companion case of *City of New Orleans* v. *United States*, *supra*, the court below concluded that the district court had "ample power * * * to protect the sovereign against such unjust enrichment on familiar principles of money had and received" (371 F. 2d at 28), and reversed (Pet. 17-20, rehearing denied, Pet. 22).

The decision below is correct, and there is no conflict or other basis for further review.

1. Petitioners first argue that the United States is barred by principles of res judicata from maintaining this action. From cases such as *Lovejoy* v. *Murray*, 3 Wall. 1, and *Bros, Inc.* v. *W. E. Grace Mfg. Co.*, 261 F. 2d 428 (C. A. 5), petitioners contend that the prior litigation in the State court bars the United States from bringing this action because (Pet. 8-9)

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[6] 25 West's Louisiana Statutes Annotated, Revised Statutes, Sec. 47:1576. (Pet. 18, fn. 1.)

[7] This latter aspect of the district court's reasoning in the present case was rejected in *Mississippi River Fuel Corp.* v. *Cocreham*, (C.A. 5), decided Sept. 13, 1967, which held that Louisiana has consented to federal court actions for the refund of State taxes.

"The decision in the State Court was adverse to the interest of the United States." The *Lovejoy* decision and other cases following it merely add to the central concepts of res judicata and collateral estoppel the principle that one who is not a party to an action but who actively manages and directs the conduct of the case may under certain circumstances be treated as if "he had been a party." *Souffront* v. *Compagnie des Sucreries*, 217 U.S. 475, 487; see 1B Moore, *Federal Practice* (1965), par. 0.411[6].

But contrary to petitioners' statement (Pet. 11), it does not follow that the United States has already had its day in court on its claim for recovery of the fund. The State court did not pass on the United States claim, nor could it; it concluded that while the United States owned the property, thus rendering the tax invalid, Chrysler lacked the requisite standing to recover the tax. This conclusion also required the dismissal of the United States intervention since, under Louisiana law, an intervention falls with the main demand. (R. 115.) As the Fifth Circuit noted in the *New Orleans* case, after such a dismissal the intervenor is, under Louisiana law, "relegated to asserting his cause of action by an independent action" (371 F. 2d at 28, fn. 16), and this is such an independent action. The State court decision would bar any attempt by Chrysler to relitigate its rights to sue under the State refund statute, but it could not and does not affect the rights of the United States to recover from petitioners on any cause of action it has in its own right nor does it bar suit to settle the rights of all concerned under the escrow agreement, which was not

even before the State court.[8] Moreover, the only issue common to both the State court litigation and this case is the ownership of the property, and under the principle of collateral estoppel the State court's resolution of that issue aids, rather than bars, the government's case. See *City of New Orleans* v. *United States*, *supra*, at 26-28.

2. Petitioners also argue that the United States has no right of action to recover the fund (Pet. 3, 11-14). They contend that no decision authorizes the government to maintain an action under the circumstances of this case. However, under the applicable law and the facts found by the district court, as well as by the State court in the prior litigation, petitioners hold funds that they had no right to collect and that Chrysler lacks standing to recover. If not before, certainly upon the government's reimbursement of Chrysler, Chrysler's interest in the fund passed to the United States which thereupon became entitled to recover it.[9] *United States* v. *Summerlin*, 310 U.S. 414, 416; *Korman* v. *Federal Housing Administrator*, 113

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[8] Even if we were to assume that the United States cause of action here should be equated with that presented through Chrysler in the State court, the judgment of that court, being based on lack of procedural capacity, precludes the parties from relitigating only the very matters decided by the State court, *i.e.*, Chrysler's standing and the ownership of the property. See *Smith* v. *McNeal*, 109 U.S. 426; 1B Moore, *Federal Practice* (1965), pars. 0.405[5], 0.409[1].

[9] The Supreme Court of Louisiana ruled that Chrysler acted as agent for the United States in procuring the property here in question. *Chrysler Corp.* v. *City of New Orleans*, 238 La. 123, 147, 114 So. 2d 579, 587.

F. 2d 743 (C. A. D. C.); *Wagner* v. *McDonald*, 96 F. 2d 273 (C. A. 8). In fulfilling its contractual obligation to reimburse Chrysler, the United States was no mere volunteer; it cannot be held in equity and good conscience to have conferred an unmerited benefit on petitioners. The State court, in denying recovery to Chrysler, noted that (R. 115) "the United States is the party ultimately entitled to the fund if it is to be recovered." It is clear that in these circumstances the United States may recover money illegally had and received in order to avoid unjust enrichment at its expense. *E.g.*, *Ward* v. *Love County*, 253 U.S. 17, 24; *United States* v. *Wurts*, 303 U.S. 414, 415. It has repeatedly done so in actions to recover state taxes illegally exacted and paid. *E.g.*, *Dept. of Employment* v. *United States*, 385 U.S. 355, 358; *Board of Commissioners* v. *United States*, 308 U.S. 343; *Marquardt Corp.* v. *Weber County, Utah*, 360 F. 2d 168 (C. A. 10); *United States* v. *City of Philadelphia*, 50 F. Supp. 170 (E. D. Pa.).

The substance of petitioners' position is that the United States has no way, in any court, of reclaiming the unlawfully extracted taxes. The present grounds for petitioners' contention are unclear. In the lower courts they relied upon the procedure provided by State statute (Pet. 18, fn. 1) and contended that although Chrysler had paid the tax by depositing the money and bonds in escrow, it lost its standing when it was reimbursed by the United States, and although the United States had reimbursed Chrysler, it had no standing because it was not the party who had paid the tax to petitioners (Pet. 18-19). The court

below was certainly right in holding that the United States need not rely on the State statute. Federal law and not State law fashions the remedies available to the United States. *E.g., Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *United States* v. *Independent School Dist. No. 1*, 209 F.2d 578, 580 (C. A. 10). As the court of appeals correctly stated (Pet. 19), quoting from the *New Orleans* decision, 371 F. 2d at 28, "Against the inequities of such a procedural trap, we think there is ample power in the United States District Court to protect the sovereign against such unjust enrichment on familiar principles of money had and received."

Contrary to petitioners' argument (Pet. 13-14), the escrow agreement requires rather than precludes recovery of the fund. The complaint alleged (R. 3-4) and petitioners in their answer admitted (R. 28) that Chrysler paid the tax under an agreement with petitioners that "upon ultimate resolution of the validity of said assessment", petitioners would retain only the same proportion of such segregated property then held as would "equal the proportion of the assessment determined to be valid" and that the balance of the property "would be returned". The State court, while ruling against Chrysler on procedural grounds, held the assessment invalid since the owner of the property was the United States, not Chrysler. Thus, no "proportion of the assessment [was] determined to be valid" within the meaning of the agreement and the entire fund should be "returned".

The petition for writ of certiorari should be denied.

Respectfully submitted.

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